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No. 96-1392

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

CHRISTOPHER J. FINK,

Petitioner,

v.

GEORGE RYAN,
Secretary of State, State of Illinois,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the State violate a driver's Fourth Amendment rights by requiring chemical testing after the driver is involved in a serious motor vehicle accident and issued a traffic ticket where the State has a special need beyond the normal need of law enforcement for requiring the search, the driver has a diminished expectation of privacy, and the State's interest would be jeopardized by requiring individualized suspicion of chemical impairment.

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JURISDICTION

The Supreme Court of Illinois entered its judgment on October 18, 1996. (App. A-1). Petitioner timely filed a petition for rehearing, which the court denied on December 2, 1996. (App. A-20). The Petition was filed in this Court on March 3, 1997. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

The Challenged Provision of the Illinois Vehicle Code

Section 11-501.6 of the Illinois Vehicle Code provides the State of Illinois with an effective tool to remove drunk drivers from Illinois roadways. Under this statute, a police officer can require a chemical test of a driver's blood, urine or breath after the driver has been involved in a motor vehicle accident causing serious personal injury or fatality and has been issued a traffic ticket. 625 ILCS 5/11-501.6(a) (1994). The accident must result in personal injury including severely bleeding wounds, distorted extremities or injuries that require the injured person to be carried from the accident scene. 625 ILCS 5/11-501.6(g) (1994). The traffic ticket must be issued for any non-equipment violation of the Illinois Vehicle Code or similar provision of a local ordinance. 625 ILCS 5/11-501.6(a) (1994). There is nothing in the statute requiring individualized suspicion that the driver was chemically impaired at the time of the accident before conducting the test. Where these requirements are met, the driver is deemed to have given consent to the chemical testing. *Id.*

Before requesting the chemical test, the police officer must warn the driver that refusal to submit to the test, or submission to the test resulting in a blood-alcohol concentration of 0.10 or more, may result in the suspension of the driver's driving privileges. 625 ILCS 5/11-501.6(c) (1994). If the driver refuses testing or the test discloses a blood-alcohol concentration of 0.10 or more, the police officer must submit a sworn report to the Illinois Secretary of State (Secretary) certifying the refusal or the results of the test. 625 ILCS 5/11-501.6(d) (1994). After receiving the sworn report, the Secretary shall enter the appropriate suspension of the driver's license and serve the driver with the notice of suspension. *Id.* The driver may request an administrative hearing to contest the suspension and seek administrative review of the Secretary's decision if the suspension is not altered. 625 ILCS 5/11-501.6(e) (1994). There is no provision in this statute regarding whether the test results can be used in criminal proceedings.

The Background Facts and the Decision of the Illinois Supreme Court

On December 18, 1994, Petitioner, Christopher J. Fink, drove his car into a telephone pole. Petitioner and his passenger found their way to a nearby house and the police and paramedics were called. When the police officers arrived, paramedics were immobilizing Petitioner and his passenger with cervical collars and backboards. The two were transported to a local hospital for medical treatment. Before proceeding to the hospital, the police officers investigated the accident scene.

At the hospital, Petitioner was issued a traffic ticket for failure to reduce speed to avoid an accident. One of the officers requested that Petitioner submit to the blood-alcohol test and warned Petitioner that his driver's license would be suspended if he refused to submit to the test. Petitioner consented to the test and a blood sample was taken by hospital personnel. The test revealed that Petitioner had a blood-alcohol concentration of 0.14. (Under Illinois law, a blood-alcohol concentration of 0.10 or higher gives rise to the presumption that the person is under the influence of alcohol. 625 ILCS 5/11-501.2(b)(3) (1994)). Petitioner was released from the hospital later that night.

Based on the police officer's report, the Secretary suspended Petitioner's driver's license for three months. Petitioner was also served with a criminal citation charging him with driving under the influence of alcohol. This citation was also based on the blood test taken at the hospital, but was not initiated by the Secretary.

Petitioner filed a motion *in limine* in the criminal case to suppress the evidence of intoxication obtained from the blood test. In this motion, Petitioner argued that section 11-501.6 violated the Fourth Amendment of the United States Constitution. The trial court granted Petitioner's motion and the criminal charge was subsequently dismissed.

Petitioner filed a civil complaint for declaratory judgment against the Secretary claiming that section 11-501.6 was unconstitutional on its face in violation of the Fourth Amendment of the United States Constitution. Specifically, Petitioner alleged that the statute violated the Fourth Amendment because it allowed an unreason-

able search of a driver for evidence of intoxication without probable cause that the driver was chemically impaired. The trial court declared section 11-501.6 unconstitutional in violation of the Fourth Amendment.

On direct appeal, the Illinois Supreme Court reversed the trial court's judgment, finding that the statute fell within the "special needs" exception to the Fourth Amendment. (App. A-11). The court found that the purpose of the statute is "to reduce the dangers posed by chemically impaired drivers by providing for the suspension of their licenses and by deterring others from engaging in similar misconduct." (App. A-6-7). The court recognized that the State of Illinois has a special need beyond the normal need of law enforcement to determine whether drivers are chemically impaired and to suspend those drivers' licenses. The court found that the statute contained sufficient limitations to protect the drivers' Fourth Amendment rights by requiring testing that is minimally intrusive and conducted only after a driver's expectation of privacy is sufficiently diminished. (App. A-11). Petitioner's petition for rehearing was denied. (App. A-20).

REASONS FOR DENYING THE WRIT

THE ILLINOIS SUPREME COURT CORRECTLY DETERMINED THAT SECTION 11-501.6 DID NOT VIOLATE PETITIONER'S FOURTH AMENDMENT RIGHTS AND ITS DECISION IS PERFECTLY CONSISTENT WITH THIS COURT'S OPINIONS.

The Illinois Supreme Court's decision finding that section 11-501.6 did not violate the Fourth Amendment to the United States Constitution is correct and consistent with this Court's opinions in similar cases. The supreme court found that the search authorized by Illinois law was reasonable under the Fourth Amendment because it was based on special needs beyond the normal need for law enforcement. The special needs exception has been applied by this Court in numerous cases. *See e.g.*, *Chandler v. Miller*, ___ U.S. ___, 117 S.Ct. 1295 (1997); *Vernonia School District v. Acton*, 515 U.S. ___, 115 S.Ct. 2386 (1995); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Bell v. Wolfish*, 441 U.S. 520 (1979).

While all of these cases involved the application of the exception, the case at bar is most analogous to the *Skinner* decision. That case upheld the constitutionality of Federal Railway Administration regulations requiring railroad employees to submit to blood, urine or breath tests after train accidents or certain rule violations. *Skinner*, 489 U.S. at 607-13. In that case, the tests were triggered by the fact that the accident or rule violation occurred and not by probable cause or individualized suspicion that the employees were impaired by alcohol or

drugs. *Id.* at 609-10. The government had a special need, beyond the normal need for law enforcement, to regulate "the conduct of railroad employees to ensure safety." *Id.* at 620. This special need, along with the facts that the individual subject to the search had a diminished expectation of privacy, the search was minimally intrusive, and the governmental interest would be jeopardized by requiring probable cause or individualized suspicion, was sufficient to satisfy the Fourth Amendment requirements. *Id.* at 621-34.

The Illinois Supreme Court closely followed *Skinner* when upholding section 11-501.6. The Illinois statute is based on the special need to ensure the public safety by removing drunk drivers from the roadways, deterring other drunk drivers, and providing important information concerning the cause of serious motor vehicle accidents. The drivers of motor vehicles have a significantly reduced expectation of privacy because they have been involved in a serious accident and are required by law to remain at the scene of the accident, have been issued a traffic ticket for a non-equipment violation of the Illinois Vehicle Code, and participate in a highly regulated activity. (App. A-6-12). The character of the intrusion on the driver's privacy rights is limited by the commonplace nature of the required tests. (*Id.*) Also, imposing a requirement of probable cause or individualized suspicion would jeopardize the State's compelling interest in public safety because a driver can be impaired without showing signs of intoxication or any signs of intoxication might not be observable where the driver is receiving medical attention.

A. The Fourth Amendment Is Not Violated Where There Are Special Needs Beyond the Normal Need for Law Enforcement and Requiring Probable Cause or Individualized Suspicion Is Impracticable.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. CONST. amend. IV. The Fourteenth Amendment extends this constitutional guarantee to searches and seizures by State officials. *Vernonia*, 115 S.Ct. at 2390. Nonetheless, the Fourth Amendment proscribes only searches and seizures that are unreasonable. *Skinner*, 489 U.S. at 619. The reasonableness of a particular search depends on the context in which the search takes place and is determined by balancing the intrusiveness of the search on the individual's privacy interests against the promotion of legitimate governmental interests. *Delaware v. Prouse*, 440 U.S. 648 (1979).

Where a search is undertaken by law enforcement officials to discover evidence of criminal activities, the balance of interests will generally require a judicial warrant issued after a showing of probable cause. *Skinner*, 489 U.S. at 619. The purpose of the warrant requirement is to assure citizens that the search or seizure is not a random or arbitrary governmental act. *Id.* at 621-622. A warrant is not required for all government searches, however. Where a warrant is not required, "probable cause is not invariably required either." *Vernonia*, 115 S.Ct. at 2390-91. "A search unsupported by probable cause can be constitutional, we have said, 'when special needs beyond the normal need for law enforcement, make the warrant and probable-cause requirement im-

practicable.'" *Id.* at 2391 (quoting *Griffin*, 483 U.S. at 873). Further, under the special needs exception, a search or seizure comports with the Fourth Amendment even when there is no individualized suspicion of wrongdoing. *Vernonia*, 115 S.Ct. at 2391 (upholding random drug testing of high school athletes); *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding road block checkpoints to find drunk drivers); *Von Raab*, 489 U.S. at 679 (upholding drug testing of federal customs officers); *Skinner*, 489 U.S. at 634; (allowing drug testing of railroad employees after a serious accident or rule violation); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (allowing automobile checkpoints to search for illegal immigrants).

When special needs are proffered to justify a search, courts must engage in a context-specific analysis examining the private and public interests advanced by the parties. *Chandler*, 117 S.Ct. at 1301. The search may be reasonable without a showing of probable cause or individualized suspicion where "the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion . . . ." *Skinner*, 489 U.S. at 624. Accordingly, after it has been established that there is a special need for the search beyond the normal need for law enforcement, a balancing test must be applied considering: 1) the nature of the privacy interests, 2) the character of the intrusion, and 3) the nature and immediacy of the governmental concern. *Vernonia*, 115 S.Ct. at 2391-96.

In the present case, it is undisputed that a compelled intrusion into the body for blood, urine or breath samples

to be analyzed for alcohol or drug content is a search within the meaning of the Fourth Amendment. *Skinner*, 489 U.S. at 616-17; *Schmerber v. California*, 384 U.S. 757 (1966). The Illinois Supreme Court correctly balanced the driver's privacy interests and the State's public safety interests and found that section 11-501.6 did not violate the Fourth Amendment.

1. Section 11-501.6 Addresses a Compelling Government Interest in the Public Safety of Its Citizens That Is Beyond the Normal Need for Law Enforcement.

Section 11-501.6 satisfies the requirements of the Fourth Amendment because it furthers the government's interest in promoting public safety, a special need beyond normal law enforcement. The State has a compelling interest in eradicating the problem of drunk driving. *Sitz*, 496 U.S. at 451-52. Drunk drivers kill and injure thousands of people each year. This Court has recognized that "drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damages." *Id.* at 451 (*quoting* 4 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 10.8(d), at 71 (2d ed. 1987)). The cumulative number of deaths attributed to drunk drivers far "exceeds the death toll of all our wars." *Perez v. Campbell*, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring). Given these statistics, "[n]o one can seriously dispute the magnitude of the drunken driving problem or the states' interest in eradicating it." *Sitz*, 496 U.S. at 451.

Similarly, the Illinois Supreme Court has long recognized the significant destruction caused by drunk drivers

in Illinois and stated that "there can be no question that drivers under the influence of alcohol pose a substantial threat to the citizenry of Illinois." *People v. Bartley*, 109 Ill. 2d 273, 285, 486 N.E.2d 880, 885 (1985), *cert. denied*, 475 U.S. 1068 (1986). An astonishing 58 percent of all highway fatalities involved drunk drivers, and these fatalities are particularly disturbing because they involve the loss of innocent lives. *Bartley*, 109 Ill. 2d at 285-286, 486 N.E.2d at 885.

In an effort to reduce the destruction caused by drunk drivers, Illinois enacted section 11-501.6. This statute promotes the State's compelling interest in public safety in three ways by: 1) removing drunk drivers from the highways, 2) deterring others from driving while intoxicated, and 3) providing valuable information concerning the cause of serious accidents. This statute allows the Secretary to suspend an individual's driver's license if the driver's blood alcohol concentration is 0.10 or more or the driver refuses to submit to testing. 625 ILCS 5/11-501.6 (1994). The suspension of an individual's driver's license after he has driven while under the influence of alcohol removes drunk drivers from the roads and promotes public safety. Just like the railroad employees subject to similar testing in *Skinner*, drivers of motor vehicles engage in an activity that is "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628.

This statute also promotes public safety by providing an effective deterrent to those who may otherwise drive under the influence of alcohol. The threat of sanctions serves to prevent violators from driving drunk based on the threat that they will likely be discovered. *Id.* at 629-

30. The deterrent effect is "significantly increased" where the violator cannot predict the occurrence of the triggering event. *Id.* at 630. Indeed, it is more likely that a driver will forgo using an intoxicating amount of alcohol prior to driving a car when he knows that if he is involved in a serious accident, and is issued a traffic ticket, he will be tested. *Id.*; *see also Martinez-Fuerte*, 428 U.S. at 557 (recognizing the importance of immigration checkpoints as a deterrent to illegal activity). This deterrent effect further aids the State in promoting public safety.

Section 11-501.6 additionally promotes public safety by providing valuable information concerning the cause of serious motor vehicle accidents. This information can be used to establish additional safety measures to further promote public safety. *See Skinner*, 489 U.S. at 630. Positive test results would indicate that the driver's drug and alcohol use was "a possible cause of an accident, and may help to establish whether a particular accident, otherwise not drug related, was made worse by the inability of impaired [drivers] to respond properly." *Id.* Even negative test results would furnish information regarding the cause of the accident by ruling out drug or alcohol impairment as a factor and allowing authorities to focus on other factors. *Id.* Accordingly, like the regulations in *Skinner*, section 11-501.6 addresses special needs beyond the normal need for law enforcement.

2. The Driver Subject to Section 11-501.6 Has a Diminished Expectation of Privacy.

The intrusion on an individual's privacy interests imposed by Section 11-501.6 is limited because the driver has a diminished expectation of privacy. An individual's

expectation of privacy depends on the context of the search and the individual's legal relationship with the State. *Vernonia*, 115 S.Ct. at 2391. It is now well-settled that "one's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *Martinez-Fuerte*, 428 U.S. at 561. Here, a driver's expectation of privacy is significantly diminished for several specific reasons: he has been involved in a serious accident and is required to remain at the scene of the accident, he has been arrested as evidenced by the issuance of a traffic ticket, and he has participated in a highly regulated activity.

The driver of a motor vehicle who has been involved in a serious accident in Illinois must remain at the scene of the accident. Section 11-501.6 encompasses only those accidents involving serious personal injury or death. 625 ILCS 5/11-501.6(a) (1994). Thus, the statute itself contemplates situations in which the driver's freedom of movement is curtailed by the very physical conditions attendant to such accidents. The Illinois Vehicle Code, independent of section 11-501.6, however, puts a driver on notice that, based on the serious nature of an accident, his freedom of movement will be restricted and he can expect to be detained for an undetermined period of time. Where an accident involving death or personal injury occurs, by statute the driver must remain at the scene and exchange necessary information, render reasonable aid and report the accident to the nearest police authority. 625 ILCS 5/11-401, 11-403 (1994). As the supreme court found, "[no] reasonable driver expects to leave the scene of a serious accident moments after its occurrence." (App. A-9).

Besides the nature of the accident, the driver's expectation of privacy is further diminished by the requirement that a ticket issue. For section 11-501.6 to apply the driver must be "arrested as evidenced by the issuance of a Uniform Traffic Ticket for any violation of the Illinois Vehicle Code with the exception of equipment violations." 625 ILCS 5/11-501.6(a) (1994). This arrest is based on the driver's actions leading to the accident. As in the instant case, Petitioner was issued a ticket for failure to reduce speed to avoid an accident. The police officer had probable cause to believe that Petitioner failed to properly reduce the speed of his vehicle, not probable cause that Petitioner was driving under the influence of alcohol, and a traffic ticket was issued. A driver who is issued a traffic ticket expects to be detained and understands that he is not free to leave until the police officer completes necessary procedures. An arrest "is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." *Terry v. Ohio*, 392 U.S. 1, 26, 88 S.Ct. 1868 (1968). Accordingly, the driver's legal relationship with the State at the time of the search diminishes his expectation of privacy.

Given the driver's diminished expectation of privacy, the additional time it takes to procure blood, urine or breath samples for testing does not significantly infringe on the driver's privacy interests. In fact, as in this case, the driver might have been injured in the accident and taken to a hospital where the samples can be obtained with essentially no additional loss of time to the driver. Even if the driver is not at the hospital, the time necessary to procure such samples is minimal. *See Skinner*, 489 U.S. at 625-27.

Petitioner argues that the time it takes to obtain samples heightens the intrusiveness of the tests. (Petition at 11). He estimated that the procedure takes at least 20 minutes. (*Id.*). Given the context of the search and the time that the driver will be required to remain at the scene of the accident or otherwise have his freedom of movement restricted, this period of time is insufficient to demonstrate a significant intrusion into the driver's privacy. *See United States v. Sharpe*, 470 U.S. 675, 687-88 (1985) (finding that a 20-minute investigatory stop was not unreasonable under the Fourth Amendment).

Finally, the driver's expectation of privacy is further reduced because driving a motor vehicle is a highly regulated activity. *See Skinner*, 489 U.S. at 627 (railroad employees had diminished expectations of privacy based on their participation in an industry that is pervasively regulated to ensure safety). The Illinois Vehicle Code occupies 404 pages of the Illinois Compiled Statutes and covers a broad range of subjects relating to the operation of motor vehicles. 625 ILCS 5/1-100 *et seq.* (1994). A significant portion of the Illinois Vehicle Code is intended to ensure safety on the State's roadways by establishing rules for nearly every aspect of owning and operating a motor vehicle and prescribing penalties for violations. The State's purpose to ensure safety depends, in large part, on drivers' ability to safely operate a motor vehicle. The State cannot effectively protect the public safety unless it can also prevent impaired drivers from using the roadways. *Skinner,* 489 U.S. at 627 (recognizing the relationship between the goal to ensure safety and the health and fitness of railroad employees). Thus, a driver's expectation of privacy is diminished by the nature of the accident, the issuance of a traffic ticket and the participation in this highly regulated activity.

3. The Chemical Tests Do Not Significantly Intrude on the Driver's Privacy.

The taking of bodily fluid samples alone does not significantly intrude on a driver's privacy interests. Section 11-501.6 authorizes blood, urine and breath tests to determine the alcohol or drug content in the driver's system. 625 ILCS 5/11-501.6(a) (1994). As this Court has found, none of these tests significantly invades a person's privacy interests. *See, e.g., Skinner*, 489 U.S. at 625-27. "[T]he intrusion occasioned by a blood test is not significant, since such 'tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.'" *Id.* at 625 (quoting *Schmerber*, 383 U.S. at 771). Urine tests are not invasive of the body and are similar to procedures encountered in a regular physical examination. *Skinner*, 489 U.S. at 626-27. Breath tests are the least intrusive and present only minimal intrusions on privacy. *Id.* at 625-26. Therefore, the chemical tests authorized by section 11-501.6 do not significantly intrude on the driver's privacy interests.

4. The State's Interest in Promoting Public Safety Would Be Seriously Jeopardized by Requiring Probable Cause or Individualized Suspicion of Driving under the Influence of Alcohol.

Requiring probable cause or individualized suspicion that a driver is under the influence of alcohol before chemical testing under section 11-501.6 would jeopardize the State's interest in promoting public safety. A driver can be under the influence of alcohol and pose a substantial threat to public safety without showing identifiable

signs of intoxication. *Skinner*, 489 U.S. at 628 (impaired railroad employees will seldom display any outward signs of intoxication detectable even by a physician). Because a driver can be legally intoxicated without exhibiting signs of intoxication, the government has a legitimate and compelling reason to perform a chemical test without the showing of probable cause of individualized suspicion of intoxication. The facts that the driver was involved in a serious accident and was issued a traffic ticket for violating the law are sufficient to permit such testing. *See Id.* at 628-29 (allowing testing of railroad employees without individualized suspicion based on an accident or violation of certain regulations).

Additionally, because alcohol and other drugs are eliminated from the bloodstream at a constant rate, any delayed attempt to gather evidence of intoxication from the driver "would likely result in the loss or deterioration of the evidence furnished by the tests." *Id.* at 631. This is especially true where, as here, the scene of the accident is chaotic and the law enforcement officer would be unable to ascertain whether the driver has observable signs of impairment. "Obtaining evidence that might give rise to the suspicion that a particular [individual] is impaired, a difficult endeavor in the best of circumstances, is most impractical in the aftermath of a serious accident." *Id.*

In the present case, as is typical, the law enforcement officers arrived at the scene of the accident while paramedics were attending to the driver. In fact, at that time, Petitioner was being immobilized with a cervical collar and backboard. The police officers were unable to talk to him or administer field sobriety tests. It would have been difficult, if not impossible, for the officers to determine

whether Petitioner was under the influence of alcohol without interfering with Petitioner's medical treatment. Therefore, it would be "unrealistic and inimical" to the State's goal of ensuring safety in highway transportation to require a showing of probable cause or individualized suspicion under these circumstances. *See Id.*

Petitioner's argument that the government interest can be achieved if individualized suspicion of intoxication is required not only ignores the compelling government interests identified in *Skinner* and the facts of this case, but it is undermined by the continued carnage on our highways. (Petition at 11-12). Although the existing drunk driving laws have reduced the destruction caused by drunk drivers, millions of people are still killed or injured each year in alcohol related accidents. Section 11-501.6 gives the State an additional tool to combat drunk driving. In the context of this case, the Illinois Supreme Court properly found that section 11-501.6 does not violate the Fourth Amendment, and therefore, this Court's review is not warranted.

B. The Use of the Chemical Test Results in Criminal Proceedings Does Not Violate the Fourth Amendment Because That Use Is Incidental to the State's Purpose to Protect the Public Safety.

The fact that chemical test results obtained under section 11-501.6 could be used in subsequent criminal proceedings does not preclude the application of the special needs exception. Evidence obtained through a search conducted to achieve a special need can be used in criminal proceedings absent a persuasive showing that the authorizing statute was a "pretext" to enable law enforcement authorities to gather evidence of criminal

violations. *Skinner*, 489 U.S. at 621 n.5; *see also Griffin*, 483 U.S. 868 (upholding the conviction of a probationer based on evidence obtained from a warrantless search of the probationer's home by his probation officer); *New York v. Burger*, 482 U.S. 691 (1987) (upholding the conviction of a junkyard owner based on evidence obtained as a result of a warrantless administrative search by police officers).

In *Skinner*, this Court reserved the issue of whether the routine use in criminal prosecutions of evidence obtained pursuant to an administrative scheme would give rise to an inference of pretext or otherwise impugn the administrative nature of the program. *Skinner*, 489 U.S. at 621 n.5. The issue was reserved because the respondents failed to seriously contend that the regulations were designed as a pretext to enable law enforcement authorities to gather evidence of criminal violations. *Id.* Without a showing that the regulations were pretextual, this Court evaluated the program in light of its obvious administrative purpose and left for another day the issue of whether the routine use in criminal prosecutions of evidence obtained pursuant to this program created an inference of pretext. *Id.*

In the present case, Petitioner has failed to present any evidence that section 11-501.6 is a pretext for gathering criminal evidence, and the Illinois Supreme Court has recognized that use of the evidence in criminal proceedings can only be incidental to the special need supporting the statute. Petitioner has failed to present any evidence that chemical testing authorized by section 11-501.6 is a pretext for gathering evidence for criminal prosecutions or that the test results are routinely used in criminal proceedings. In this case, Petitioner's test

results were sent to the Secretary and his driver's license was suspended. Additionally, based on the test results, Petitioner was charged with driving under the influence of alcohol. Under the trial court's interpretation of section 11-501.6, however, the test results were suppressed and the criminal charge was dismissed. Petitioner did not supply the Illinois courts or this Court with any additional facts. Given the facts presented, Petitioner has failed to make a threshold showing that the test results are routinely used in criminal proceedings or any other showing indicating that the statute is used as a pretext for gathering criminal evidence.

This record is therefore inadequate to enable this Court to decide whether the test results are routinely used in criminal proceedings or whether the statute is used as a pretext to gather evidence for criminal prosecutions. As in *Skinner*, this issue should be reserved for a case where a sufficient record is available to make these determinations. *Skinner*, 489 U.S. at 621 n.5.

Additionally, this Court should note that the Illinois Supreme Court faithfully followed *Skinner* and recognized the impact that allowing the routine use of the test results would have on the constitutionality of the statute. The supreme court stated that "the legislature has made clear that criminal prosecution is only incidental to the primary purpose of the statute. Because the use of test results in other proceedings is incidental to the amended statute's purpose, the 'special needs' exception to the warrant requirement remains applicable." (App. A-12). Based upon the Illinois Supreme Court's understanding of the relationship between the special needs exception and the use of the test results in criminal proceedings, any improper use of these results in the future

will be addressed by the Illinois courts and then could be presented for this Court to examine based on a fully developed record. The present case, in its current posture, contains insufficient facts for this Court to decide the issue left open in *Skinner*. Therefore, review by this Court is both unnecessary and unjustified.

CONCLUSION

For all the foregoing reasons, this Court should deny the Petition for Writ of Certiorari to the Illinois Supreme Court.

Respectfully submitted,

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